



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: SEPTEMBER 12, 2022

IN THE MATTER OF:

Appeal Board No. 624141

PRESENT: GERALDINE A. REILLY, MEMBER

The Department of Labor issued the initial determination holding the claimant ineligible to receive benefits, effective March 15, 2021, on the basis that the claimant was not capable of work. The claimant requested a hearing. The Commissioner of Labor objected that the hearing request was not made within the time allowed by statute.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There was an appearance by the claimant. By decision filed April 05, 2022 (), the Administrative Law Judge sustained the timeliness objection and continued in effect the initial determination.

The Appeal Board, on its motion pursuant to Labor Law § 620 (3), has reopened and reconsidered the Judge's decision.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The notice of determination has a mail date of November 2, 2021. The claimant received the determination but could not recall the date he received it. The instruction on the determination advises that "if you disagree with this determination, you have the right to request a hearing... no later than thirty (30) days from the mail date on this notice".

The claimant's accountant suggested that he request a hearing. On February 1, 2022, the claimant requested a hearing. The claimant did not suffer from a

physical disability or mental incapacity that prevented him from requesting a hearing.

The claimant was physically able to work as of September 15, 2021 and thereafter.

OPINION: Under Labor Law § 620 (1), a party who is dissatisfied with a

determination may request a hearing but must do so within thirty days of the mailing or personal delivery of the determination. Pursuant to the Board's regulations, a hearing request is deemed timely if postmarked within thirty days of the receipt of such determination. Absent proof to the contrary, a determination is deemed mailed on the date recited on the determination and received by the party to whom it was addressed no later than five business days after the date mailed (12 NYCRR § 461 [1]).

The credible evidence establishes that the claimant received the November 2, 2021 determination. As the claimant could not recall the date of receipt, under the Board's rule it is deemed received on November 9, 2021. His copy contained the instruction that he must request a hearing no more than 30 days from the determination. The claimant requested a hearing on February 1, 2022. No physical disability or mental incapacity prevented him from requesting a hearing. Accordingly, we conclude that the claimant's request for a hearing was untimely.

However, as the lack of capability determination is an eligibility determination and therefore continues until the reason for the ineligibility no longer exists, the claimant's request for a hearing is timely beginning thirty days from the date of the hearing request or January 2, 2022. The claimant is therefore entitled to a decision on the merits from the January 2, 2022 to the date of the hearing on April 4, 2022.

The credible evidence further establishes that the claimant was physically able to work beginning January 2, 2022. Accordingly, we further conclude that the claimant was eligible for benefits, beginning January 2, 2022 through April 4, 2022.

DECISION: The decision of the Administrative Law Judge is modified as follows and, as so modified, is affirmed.

The Commissioner of Labor's timeliness objection is sustained through January 1, 2022, only.

The initial determination, holding the claimant ineligible to receive benefits, effective March 15, 2021, on the basis that the claimant was not capable of work, is continued in effect beginning March 15, 2021 until January 1, 2022, and is overruled from January 2, 2022 through April 4, 2022.

GERALDINE A. REILLY, MEMBER